



For a thriving New England

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May 1, 2019

Via Hand-Delivery and Email

Ms. Pamela G. Monroe, Administrator
New Hampshire Site Evaluation Committee
21 South Fruit Street, Suite 10
Concord, NH 03301

RE: Seacoast Reliability Project (Docket No. 2015-04)

Dear Ms. Monroe:

Please find enclosed for filing in the above-referenced matter an original and one (1) copy of Conservation Law Foundation's Motion to Stay Decision and Order Granting Certificate of Site and Facility.

Copies of this letter and the enclosed Motion have this day been forwarded via email to all parties on the Distribution List.

Thank you for your attention to this matter.

Sincerely,

Thomas F. Irwin
V.P. and Director, CLF New Hampshire

cc: Docket No. 2015-04 Distribution List

Encls.

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2015-04

Application of Public Service Company of New Hampshire
d/b/a Eversource Energy for a Certificate of Site and Facility for Construction of New
Transmission Line (Madbury to Portsmouth)

**MOTION OF CONSERVATION LAW FOUNDATION
TO STAY DECISION AND ORDER GRANTING
CERTIFICATE OF SITE AND FACILITY**

Conservation Law Foundation (“CLF”), an intervenor in this proceeding, hereby moves for a stay of the Decision and Order granting a Certificate of Site and Facility for the project that is the subject of this docket. In support of its motion, CLF states as follows:

Introduction

1. This proceeding concerns an application by Eversource (“Applicant”) for a certificate of site and facility to site, construct and operate a new 115kV transmission line from Madbury to Portsmouth (“project”). The project includes a proposal to install three cables across Little Bay using jet plow, hand-jetting, and trenching methods.

2. Following a lengthy adjudicatory process involving Applicant, Counsel for the Public, and several intervenors, including CLF, on January 31, 2019, the Committee issued a decision granting Applicant a certificate of site and facility.

3. Following the Committee's decision, CLF, the Durham Residents Group, and the Town of Durham timely filed motions for rehearing and/or reconsideration. On April 11, 2019, the Committee issued a decision denying such motions.

4. On April 19, 2019, without providing notice to the intervenors in this proceeding, Eversource submitted correspondence to the Site Evaluation Committee (Committee) notifying the Committee of its intent to commence construction of portions of the Seacoast Reliability Project on May 6, 2019.

Argument

5. The commencement of construction is premature for at least three reasons and, if permitted to proceed, could result in wasted resources, unnecessary environmental and community impacts, and practical constraints on other entities with decision-making authority.

6. First, commencement of construction is premature because the Committee's decision and order granting a certificate of site and facility remains subject to appeal and, as such, cannot be considered a final, unappealable decision. To the contrary, the time period for seeking judicial review of the Committee's decision and order does not expire until May 13, 2019. *See* RSA 162-H:11, RSA 541:6. CLF intends to petition the Supreme Court for judicial review within this time period and, upon information, believes other intervenors may as well. Unless and until appeals rights have been exhausted, the Committee's decision and order, including the certificate of site and facility, are not final and construction should not be permitted to proceed.

7. In addition to lacking a final, unappealable certificate, Eversource's intent to

commence construction also is premature because the U.S. Army Corps of Engineers (“Army Corps”) has not rendered a determination on Applicant’s application for a Section 404 permit under the Clean Water Act, relative to the project’s impacts on resources within the Army Corps’ jurisdiction. More specifically, on April 23, 2019, the Army Corps published a public notice of its Section 404 permitting process.¹ The public notice signals a significant departure from the Army Corps’ reliance primarily on the N.H. Department of Environmental Services for wetlands permitting purposes pursuant to a general permit issued by the Army Corps. Instead, the Army Corps is now proceeding with an *individual* permitting process for the project. Pursuant to this process, the Army Corps (a) has opened a public comment period, (b) has invited the requests for a public hearing, (c) will review the project’s impacts on aquatic resources and on the public interest, (d) will prepare either an Environmental Assessment or Environmental Impact Statement pursuant to the National Environmental Policy Act, and (e) will determine whether to grant required permits under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899.² Unless and until this process results in the issuance of required permits, Applicant lacks authority to engage in work in wetlands and aquatic resources within the Army Corps’ jurisdiction, including but not limited to Little Bay.

8. In addition to lacking a final, unappealable certificate and required permits from the Army Corps, according to Applicant’s April 19, 2019 correspondence to the Committee, the project has not received required permits from the N.H. Department of Transportation.

9. Because Applicant has not obtained necessary approvals for the project, including

¹ See Public Notice, Army Corps, File No. NAE-2015-00665, at <https://www.nae.usace.army.mil/Portals/74/docs/regulatory/PublicNotices/2019/NAE-2015-00665-PN.pdf>.

² *Id.*

a final and unappealable certificate, there is a significant risk that the commencement of construction will result in wasted resources and unnecessary community and environmental impacts. For example, the New Hampshire Supreme Court and the Army Corps could each reach decisions affecting whether or how the project is constructed. Moreover, an important part of the Army Corps' analysis will be whether the project, as proposed, is the least environmentally damaging practicable alternative within the meaning of applicable regulations, including whether an alternative *other than* the proposed transmission line must be pursued.³ In light of future and pending decision-making – by the Supreme Court, the Army Corps, and NHDOT – proceeding prematurely with piecemeal construction of portions of the proposed project, on the assumption that the project will obtain all necessary and final approvals and will remain unchanged, may result in unnecessary construction-related impacts and costs.

10. The commencement of construction while the certificate is subject to appeal, and while the project is subject to further permitting, also should not be permitted because it could place practical constraints on decision-makers. For example, just as Applicant urged the Committee to approve the project as the last stage of its Seacoast Solutions suite of projects, Applicant could use completed and ongoing construction activity, and associated investments, as a means to persuade regulators, such as the Army Corps, not to render a decision that alters the project as currently proposed. Applicant should not be permitted to place decision-makers such as the Army Corps in the position of weighing already-constructed portions of the project, and already-incurred construction costs, in their decision-making.

³ See 40 C.F.R. § 230.10(a) (prohibiting the discharge of dredged or fill material “if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem” and stating that “practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise.”).

11. In light of the foregoing considerations, it would not be in the public interest to allow project construction to proceed at this time. Accordingly, a stay of the Committee's decision and order is warranted.

12. The following parties concur in the relief requested herein: Donna Heald, Durham Residents Intervenor Group, The Durham Historic Association, Mr. Frizzell, The Smith Family, and The Durham Residents. The following parties object this motion: Eversource. Counsel for the Public takes no position.

WHEREFORE, Conservation Law Foundation respectfully requests that the Committee stay its decision and order, including the effectiveness of the certificate of site and facility and the commencement of construction, until such time as (a) Applicant has a final, unappealable decision and certificate authorizing the project, and (b) Applicant has obtained all legally required permits.

Respectfully submitted,

CONSERVATION LAW FOUNDATION

BY:  _____

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Date: May 1, 2019

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion has on this 1st day of May 2019 been sent by email to the service list in Docket No. 2015-04.

A handwritten signature in blue ink that reads "Thomas F. Irwin". The signature is written in a cursive style with a prominent initial "T".

Thomas F. Irwin, Esq.
Conservation Law Foundation